No. 3771

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARTHA M. JACKSON, executrix of the last will and testament of Elmer B. Jackson, deceased,

Plaintiff in Error,

vs.

SUNLIT FRUIT COMPANY (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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The statement of facts given by plaintiff in error is misleading in stating "but delivery was refused for the year 1918 by Jackson and wife." In point of fact as was duly pleaded, proved and found by the Court, Jackson, in 1918, not only refused to deliver that crop but also announced that he would never deliver any more ever. He repudiated the contract entirely.

A complete answer to practically all the points urged by the plaintiff in error is found in the opinion of the trial Court, filed in this action, and which appears in the transcript, pages 78 to 84, except pos-

sibly as to certain rulings on evidence. We beg to refer to that opinion, which, for the convenience of the Court, we have printed as an appendix attached hereto. In addition to that opinion, we wish to add the following, on points which were not urged by defendant's counsel in the briefs filed with the trial Court, and which were, therefore, not covered in the memorandum opinion.

I.

SECTION 1880, SUBDIVISION 3, CALIFORNIA CODE OF CIVIL PROCEDURE APPLIES ONLY TO THE PARTIES, AND NOT TO OFFICERS OR AGENTS OF PARTIES.

Defendant objected at the trial to certain testimony by F. E. Laney, the person who represented the plaintiff corporation at the time the contracts were signed by defendant's testator, Elmer B. Jackson, relying on Section 1880, Subdivision 3, of the Code of Civil Procedure of California.

> "Section 1880. PERSONS WHO CANNOT TESTIFY. The following persons cannot be witnesses:
>
> * * * * * * *
>
> "3. (Parties, etc., vs. Executors, etc.) Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

Counsel for defendant took the position that this section prohibited testimony by the agent of a corporation which became the party to an action against the estate, as to any facts occurring before the death of the decedent. It is plain that, under the very terms of the section, the objection is unsound. As the learned trial Court stated (Trans. p. 87):

> "The COURT. I do not think the objection is well taken. This witness is not a party to the action in any sense of the word. He is like any other individual."

The Court's view is amply sustained by the Supreme Court of California in *Merriman v. Wickersham,* 141 Cal. 567; 75 Pac. 180. In this leading California case, there is a discussion of the statutes generally throughout the United States; and the Court holds that a witness is not prohibited from testifying, although he was a stockholder and director and officer of the plaintiff corporation, inasmuch as the prohibition runs simply against the parties to the action.

> "It is concluded, therefore, that our statute does not exclude from testifying a stockholder of a corporation, whether he be but a stockholder, or whether, in addition thereto, he be a director or officer thereof."

Citing with approval the earlier California case of *City Savings Bank v. Enos,* 135 Cal. 167; 67 Pac. 52, which is to the same effect, and in which the Court says, disposing of the contention that the agents of a corporation were disqualified:

> "To hold that the statute disqualifies all persons from testifying who are officers or stockholders of a corporation would be equivalent to materially amending the statute by judicial interpretation."

This is the law generally.

40 Cyc. 2290, Witnesses:

> "Where the statute in terms excludes only parties to the action, an officer, member, or stockholder of a corporation, which is a party, is competent."

Citing cases from eleven states, supporting the text, with no cases cited to the contrary.

Therefore, we will not burden the Court with a citation of further authority to demonstrate the unsoundness of the contention of plaintiff in error, that error was made in permitting the testimony of Laney, over the objection thus urged.

The California cases cited by plaintiff in error, to wit:

Rose v. Southern Trust Co., 178 Cal. 580;
Tippo v. Landers, 182 Cal. 771;
Roncelli v. Fugazi, 186 Pac. 373;
Palmer v. Guaranty Trust etc. Co., 188 Pac. 302;

are simply applications of the ordinary rule that a *party* cannot testify, and have no application whatever in the case at bar, where the witness was not a party. These cases are simply not in point.

"Error" number five is covered by above. The Court's ruling in permitting Laney to testify was correct.

II.

CONTRACTS WERE PROPERLY ADMITTED IN EVIDENCE BECAUSE THEY WERE SIGNED BY THE PARTY TO BE CHARGED, AND ACTED UPON BY BOTH PARTIES.

Apparently the principal claim of error was the admission in evidence of the contracts on which the suit was brought, in the absence of any showing that F. E. Laney, who represented the plaintiff in the making of the contracts, had been previously authorized in writing to enter into the contract. This contention was based upon Section 1624 of the Civil Code of California, which provides as follows, to wit:

> "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed *by the party to be charged,* or by his agent:
>
> "1. An agreement that by its terms is not to be performed within a year from the making thereof;
>
> * * * * * * *
>
> "4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels or the evidences, or some of them, of such things in action, or pays at the time some part of the purchase money; but when a sale is made at auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum,"
>
> * * * * * * *

and that section of the Civil Code of California, requiring that authority to enter into a contract in

writing can only be conferred by writing. (Section 2309, Civil Code.) This objection constitutes Assignments of Error III and IV.

(1) The answer to this contention is that the contracts were "subscribed by the party to be charged".

It has been held repeatedly that under this section it is only necessary, to enforce the contract against defendant, that defendant shall have signed the same. In this case, the original defendant was Elmer B. Jackson, and the suit is defended in his right by his executor. *He subscribed the contracts.* Therefore, in the absence of any execution whatever by the plaintiff, he would be bound. The leading California cases are:

Harper v. Goldschmidt, 156 Cal. 245;
Cavanaugh v. Casselman, 88 Cal. 543;
Scott v. Glenn, 98 Cal. 171;
Dennis v. Strassburger, 89 Cal. 589;
Coppel v. Ageltinger, 167 Cal. 706;
California etc. Co. v. Cutteback, 27 Cal. App. 450.

It is unnecessary to go into theoretical justification for the foregoing rule, since it results from the very terms of the statute itself, and has been conclusively announced by the Court of last resort in this state time without number, and likewise in all other jurisdictions, including the Federal Courts.

In *California Canneries v. Scatena,* 117 Cal. 447, the memorandum was merely signed by the seller. Recovery for plaintiff was affirmed.

That this is the law almost universally, is apparent from the notes in the Annotated Cases, as follows:

3 Ann. Cas., p. 1036 (Note):

> "The memorandum prescribed by the Statute of Frauds is usually required by the statute to be signed by the 'party to be charged' or by the 'parties to be charged'. In either case, by the great weight of authority, the quoted words are held to refer not to the party or parties 'charged' with the contract, but to the party or parties 'charged' in the action, that is, the defendant or defendants.
>
> *"And the fact that the plaintiff has not signed the memorandum does not affect his right to maintain the action."* (Italics ours.)

A contention to the contrary was summarily treated by Mr. Justice Lurton in the case *In re Neff*, 157 Fed., at page 60:

> "The contracts are plainly agreements to purchase the shares of stock named at the time and price stated. They rest upon a sufficient consideration, and are written agreements to take and pay for the shares named and signed by the parties to be charged and delivered to and accepted by the promisees. *There is, therefore, nothing in the objection as to the contract's being invalid under the statute of frauds because not signed by claimants also."* (Italics ours.)

Beckwith v. Clark, 188 Fed. at page 176, per Sanborn, Judge:

> "Neither Clark (defendant) nor his successors in interest could be heard to say that the contract was void because the complainant failed to sign it, for he was not the party to be charged."

(2) Where a contract, though describing two parties, is signed by one only, but acted upon by both, it is binding on both.

In addition to the fact that the contract was actually signed by the party to be charged in this case, the execution and resultant admissibility in evidence of the contracts were evidenced by the conduct of the parties in this action, duly proved and found by the Court, and, in fact, *admitted* by plaintiff in error, defendant below, in the opening statement of the defense. The writings were signed by Elmer B. Jackson, the original defendant in this action, and by F. E. Laney, for the plaintiff, in February, 1917. They provided for the sale by Elmer B. Jackson to the plaintiff of certain crops of peaches, to be grown on land mentioned in the contracts, for the ten years from 1917 to 1926. The contract required the buyer, the plaintiff, to furnish the boxes; and, accordingly, in the summer of 1917, plaintiff furnished Elmer B. Jackson with fruit boxes, which he took and in which he delivered the 1917 crop of fruit from both the Bogue Orchard and the Oswald Orchard, and for this fruit plaintiff gave Elmer B. Jackson receipts, and later paid him in full. (Trans. pp. 105-106, testimony of Chester Littlejohn.)

In fact, it is stipulated in the bill of exceptions as follows:

> "The proof showed that Elmer B. Jackson delivered first the Tuscan cling peaches, and later on the Phillips cling peaches, in 1917, and that

plaintiff paid in full for all the peaches received from him in 1917."

And in the opening statement of the defense, counsel for defendant, now plaintiff in error, stated:

"We admit that a contract was made for the sale of the fruit in 1917, and that it was delivered by the defendant, Mr. Jackson." (Trans. p. 105.)

In the memorandum opinion, the trial court refers to the fact that both parties recognized and acted upon the contracts as valid and binding until July, 1918, and, also, that the plaintiff took and paid in full for the peaches grown in 1917, and delivered to it by Jackson. Therefore, the rule above stated clearly applies.

9 Cyc. 300, Contracts:

"When a contract is signed by one of the parties only, but is accepted and acted upon by the other party, it is just as binding as if it were signed by both of the parties."

The leading cases in California are:

Cavanaugh v. Casselman, 88 Cal. 543:

"A written memorandum of a contract for the sale of real property, which contains the names of the parties, and the price, and gives a complete description of the property, and is subscribed by the party to be charged, is sufficient to satisfy the statute of frauds, although not subscribed by the party seeking to enforce it, and although the agreement purports to be an agreement *inter partes.*

"A contract which purports on its face to be *inter partes* need not invariably be signed by all

parties named in the contract in order to become operative; and in the absence of a showing that the contract was not to be deemed complete until other signatures should be added, the parties signing it will be holden thereon."

Sparks v. Mauk, 170 Cal. 122:

"In an action to enforce a written contract which contemplated the execution of it by a signing by both parties, a defendant who signed the contract is estopped to set up as a defense that the plaintiff did not sign, where there has been a part performance of the contract and an accession to its terms by both parties."

Fidelity etc. Co. v. Fresno Flume Co., 161 Cal. 473:

"The receipt and acceptance by one party of a paper signed by the other and purporting to embody all the terms of a contract between the two, binds the acceptor as well as the signer to the terms of the paper."

Reedy v. Smith, 42 Cal. 245:

Contract signed by defendant only, and therefore claimed to be invalid. *Held,*

"Under the circumstances revealed by the evidence, I think the Court properly found that the contract had been executed and was binding upon both parties. Both had acted upon it as a binding contract. The plaintiff certainly would have been estopped from denying that it had become binding upon them had suit been brought upon it by the defendants."

To same effect, see the following cases:

Wiley v. California Hosiery Co., 32 Pac. 522 (Cal.);

Lavenson v. Wise, 131 Cal. 369;

Amherst Inv. Co. v. Meachem, 124 Pac. 682;
Lamson v. Hartung, 19 N. Y. Supp. 233.

When the contracts were offered in evidence, the attorney for the plaintiff called the attention of the trial Court to the fact that the contracts were signed by Jackson, the party to be charged, and also that both parties acted upon the contracts during the first year; so that both were bound as effectively as if both had signed, as shown by this colloquy:

> "The COURT. You propose to follow this up by proving that Jackson complied with this contract for one year?
> Mr. SELBY. Yes.
> The COURT. And recognized it as a valid contract?
> Mr. SELBY. Yes.
> The COURT. The objection will be overruled, with the understanding that you will follow this up with proof."

(3) Reply to argument of plaintiff in error at pages 19 to 24, opening brief.

The cases cited by plaintiff in error in support of the argument that the Court erred in admitting the contracts in evidence are not in point. In no one of those cases was the action brought against the party who did sign the contract. These are the cases relied upon by plaintiff in error, as follows:

Pacific Bank v. Sonte, 121 Cal. 202;
Blood v. La Serena Land & Water Co., 113 Cal. 221;
Salfield v. The Sutter County Land etc. Co., 94 Cal. 546;

Sellers v. Solway Land Co., 31 Cal. App. 259; 160 Pac. 175;
Vasik v. Speese, 26 Cal. App. 129; 146 Pac. 61;
McRae v. Ross, 170 Cal. 74;
Seymour v. Oelrichs, 156 Cal. 782;
Nason v. Lingle, 143 Cal. 363.

As the quotations printed by plaintiff in error in the brief at page 22 show, these cases simply involve actions *against* parties who had not signed the contract, and are certainly not in point. There is no reply made by the plaintiff in error to the cases cited and relied upon by us in the lower Court, and cited in the opinion of the lower Court, to the effect that all that is required is that the contract be signed *by the party to be charged,* as it was in this case.

Even further from the point are the other cases cited by plaintiff in error in this subdivision of the brief:

Pacific Bank v. Sonte, 121 Cal. 202;
Blood v. La Serena Land & Water Co., 113 Cal. 221; and
Alta Silver Mining Co. v. Alta Placer Mining Co., 78 Cal. 629,

involving, as they do, merely the authority of corporate officers to enter into the contracts in question, and in no way touching upon the question of whether an action can be maintained against the party who did sign the contract, where the statute requires merely that it be signed by the party to be charged.

The statement in the brief of plaintiff in error, at page 21:

> "We submit that both parties to the contract were to be charged, and therefore, a written authorization was necessary";

conclusively demonstrates the unsoundness of the contention of plaintiff in error; for the statement that, within the meaning of the statute of frauds, both parties are to be charged, is utterly contrary to all the authorities, as shown above:

> "The party to be charged is the party who is defendant in the action."

No attempt is made to answer the second reason given by us above, supporting the Court's action, to wit, that the contract, having been acted upon by both parties, was as effective as if signed by both, except a vague reference at page 24 and a statement, "the plaintiff parted with nothing". This, of course, is contrary to the evidence and the findings of the Court, and the express admission of the defendant's counsel. The fruit for the year 1917 was bought and paid for, and the contract was fully complied with by both parties during that year, and the cases cited above exactly apply.

III.

REPLY TO POINT "ERROR No. IV" IN BRIEF OF PLAINTIFF IN ERROR.

Under the guise of treating assignments of error actually presented in the transcript, plaintiff in

error, at pages 25, 26, 27, 28 and 29 of the opening brief, has presented an assignment to the effect, as stated, "that the contracts, 'Plaintiff's Exhibits No. 5 and No. 6,' were void because the wife of Jackson did not join with him in executing the contracts." (p. 25.)

No error is assigned because of any ruling of the Court in passing upon that objection. Assignment of Error No. IV, found in the transcript at pages 113-117, embodying the proceedings upon the admission of plaintiff's Exhibit 6, discloses that no claim was made by plaintiff in error, as now attempted to be asserted, that the contracts were void because the wife did not join in the execution thereof. Therefore, we respectfully submit that plaintiff in error will not here be heard to urge this objection, under the rule.

However, as is shown by the opinion of the lower Court, plaintiff in error did make this contention in the brief filed when the case was submitted, and we conclusively answered that contention, and the lower Court adopted our reasoning in Subdivision 2 of its opinion, as follows:

(Opinion per Bean, J.)

> "The contracts in suit are not contracts of present sale, but are executory contracts for future sale and delivery of personal property. The language of each is, 'the seller has agreed to sell to the buyer and the buyer has agreed to buy from the seller for a period of ten years from 1917 to 1926, inclusive'. It is immaterial, therefore, whether Jackson owned the land upon which the peaches were to be grown in

his own right or it was community property. His contracts were to sell to plaintiff in future certain property and, as said in *Irwin v. Williar* (110 U. S. 508), 'The generally accepted doctrine in this country is as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them.' "

Citing in support the following authorities:

23 Ruling Case Law (Sales), page 1249, Sec. 67:

"While there can be no sale of an article which is not in existence actually or potentially a person may legally enter into an executory contract to sell such article in the future, when it comes into existence; and according to the general view prevailing in this country, such a contract is not void by reason of the fact that at its date the seller does not have the goods, has not entered into any arrangement to buy them, and has no expectation of receiving them, except by going into the market and buying or otherwise acquiring them."

Bibb v. Allen, 149 U. S. at page 492:

"It is well settled that contracts for the future sale of merchandise or tangible property are not void, whether the property is in existence in the hands of the seller, or to be subsequently acquired."

Clews v. Jamieson, 182 U. S. 461.

Smith v. Semon, 32 Cal. App. 644:

"The appellant herein makes the further contention that the trial court committed an error in striking out of his answer his first pleaded defense, the substance of which was

> that the assignor of the plaintiff was not the owner of the automobile at the time of the sale thereof by him to the defendant; but this action of the court, even if error in the then state of the case, would be error unattended with injury to the defendant, for the reason that the contract when introduced in evidence proved not to amount to a present sale of the automobile but only to be a contract for a future and conditional sale thereof. *In the cases of such contracts, it is well settled that the ownership of the thing to be sold and transferred in futuro need not be in the person making the agreement of sale at the time of such agreement.*"

The opinion of the trial Court, based on the authorities, that an executory contract for future sale of personal property is binding on the seller, although he does not have the present title at the time the contract is entered upon, certainly renders it immaterial that the land is the community property of the seller and his wife in the case of one of these contracts, and that, as to the other, the property belonged entirely to the wife. This is obvious. Since the contracts by Jackson were binding and valid upon him, and he would be liable for their breach had he no right, title nor interest whatever in the subject-matter of the future sale, crops to be grown in the future, they are certainly none the less binding because he actually did have the right to dispose of the crops to be grown at the Oswald place, the community property, and the land on which the other fruit was to be grown be-

longed to his wife. Other authorities supporting the action of the Court are:

Meyer v. Shapton, 144 N. W. 887;
35 Cyc. page 46, Sales;
Mechem on Sales, Section 203; Section 1031.

Goodrich v. Turney, 186 Pac. 806 (Cal.), is really conclusive of this case on the point in which our argument is set forth above, holding that whether the property be community or separate is immaterial, where the husband signed a contract. The Court says:

> "But, as far as is concerned the right of the plaintiff to the stipulated compensation for securing an acceptance of the offer, it is wholly immaterial whether the property was or was not community, or, if community, whether the defendant's wife signed the written offer. *Indeed, the defendant's title to the property might be so defective that he could not have given a clear title thereto if the exchange had been consummated, and still the plaintiff would be entitled to the commission agreed upon.* There was no agreement between the plaintiff and the defendant that the plaintiff's right to the commissions was to depend upon whether the defendant could make a legal conveyance of his property to the Padgets or whether the title was good or defective, or whether the exchange was actually consummated."

Applied to the existing case, this language is clear authority that Elmer B. Jackson could not free himself from liability by his failure of title to the fruit on either ranch. The contracts simply pledged him to get title, if he did not then have it.

(a) Contracts were not for sale of real estate.

The two contracts signed by Jackson in February, 1917, were not for the sale of real estate, of any interest therein. They were for the future sale of personal property, not at that time in existence; annual crops of fruit to be grown, then severed, and delivered to the buyer. Such contracts are not for an interest in real estate.

> *Pavlicevich v. Skinner,* 77 Cal. 239, so holding as to contract for grapes to be grown and conveyed;
> *Davis v. McFarlane,* 37 Cal. 634;
> *O'Brien v. Ballou,* 116 Cal. 318.

Kreisle v. Wilson, 148 S. W. 1132 (citing Brown Statute of Frauds):

> "But upon a careful examination the more approved and satisfactory rule seems to be that if sold specifically, and to be, by the terms of the contract, delivered separately and as chattels, such a contract of sale is not affected by the fourth section of the statute as amounting to a sale of any interest in the land; and that the rule is the same when the transaction is of this kind, whether the product sold be trees, grass, or any other spontaneous growth, or grain, vegetables or other crops raised by periodical cultivation."
>
> *20 Cyc.,* 228.

Section 172 of the Civil Code was not changed by the amendment of 1917, as applied to personal property. The husband still had, after the amendment as before, the right to the management and

control of the personal property, and to dispose of the same for a "valuable consideration". Therefore, the amendment of 1917 had no effect on this case. (It could not have anyway since the contract was made in February, 1917, and the amendment was not in effect until July, 1917.)

It is unnecessary to cite decisions to this Court that the words "valuable consideration" are not synonymous with *adequate* consideration. In many cases, an action for damages can be maintained since the contract is based upon a valuable consideration, although an action for specific performance could not be maintained, because the consideration was not adequate.

The Courts of California have already held that merely a valuable consideration is required.

Ragan v. Ragan, 29 Cal. App. 63; 154 Pac. 479.

Farrington v. McClellan, 26 Cal. App. 375; 146 Pac. 1051:

> "While the husband cannot make a gift of the community property or convey it without a valuable consideration, unless the wife, in writing, consents thereto, he nevertheless has the management and control of such property, 'with the like absolute power of disposition, other than testamentary'. (Civ. Code, sec. 172.) From the provisions of the code thus adverted to, it follows that the appellant had the legal right to sell the property without the acquiescence or consent of his wife. This proposition being true, he had the right to authorize another, without the consent of his wife, to sell the property for him *in consideration of any*

> *compensation which might be satisfactory to him and his agent."*

Furthermore, there is no showing that the consideration in the case at bar was not adequate.

> "The question of adequacy of consideration relates to the time of the formation of the contract."
>
> *Morrill v. Everson,* 77 Cal. 114;
> *Willard v. Taylor,* 8 Wall. (U. S.) 557;
> *Cox. v. Burgess* (Ky. 1906) 96 S. W. 577;
> *Finlen v. Heinze* (Mont.) 73 Pac. 123;
> *26 Am. & Eng. Encyc. Law* 27.

As stated above, even if the case had actually involved contracts purporting to be for the present sale of the property, or even if they had been for the sale of real estate, and the wife had not joined, it is certain that Elmer B. Jackson could not defend as against an action for breach of his own contract, because of the failure of the wife to join therein; and the entire community property argument is utterly immaterial.

(b) Contracts not a restraint on alienation at all.

The citation in Section 715 Civil Code (brief p. 29), prohibiting the suspension of the absolute power of alienation for a period longer than lives in being, is even more futile than the community property argument. Assuming, for the sake of argument, that these contracts conveyed an interest in the land, it is certain that they did no more suspend the absolute power of alienation than a lease

would have. Of course, neither these crop contracts nor a lease for years suspends the power of alienation at all.

The power of alienation, as that expression is used in Section 715 and in the law of perpetuities, is defined in Section 7160, as follows:

> "The power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

To convey a ten years' interest to an actual living person does not in the slightest degree suspended the absolute power of alienation.

Toland v. Toland, 123 Cal. 140:

> "Whenever there are persons in being by whom an absolute interest in possession in the land can be conveyed, the power of alienation is not suspended."

Estate of Campbell, 149 Cal. 717;
Williams v. Williams, 73 Cal. 90;
Balfour Guthrie Investment Co. v. Woodruff, 124 Cal. 167;
30 Cyc., 1504;
Chaplin on Suspension, Section 64.

We regret the necessity of answering such a trivial objection; but the importance of this case to our clients, and the apparent good faith of counsel's suggestion that these contracts offend the rule against perpetuities, impel us to answer it. In fact, it is unworthy of mention.

Of course, no error is assigned based upon the claimed invalidity of the contract because of the statutory prohibition of restraint upon alienation, and this Court would not notice the argument for that reason, as well as for its utter triviality.

IV.

THE COURT PROPERLY REJECTED THE IMMATERIAL EVIDENCE OF THE VOLUNTARY ADVANCE OF PRICE BY PLAINTIFF TO OTHER GROWERS. (Assignments of Error Numbers Six and Seven.)

The plaintiff in error at the trial admitted that the measure of damages was the difference between the market price and the contract price of the peaches, as shown by the following colloquy.

> "The COURT. I understand the question of damages would be the difference between the contract price and the market price.
>
> "Mr. SELBY. Without a doubt.
>
> "The COURT. *Whatever goes to show the market price would be competent.*
>
> "Mr. HEWITT. That is the rule as to the measure of damages, of course." (Trans. p. 96.)

But counsel now claims that the plaintiff could only recover the difference between what it *voluntarily* paid other persons with whom it had term contracts and the market price; on the assumption that it would have treated Jackson similarly; and now assigns the exclusion of such evidence as error.

Counsel did not offer this evidence as bearing upon the market price, which, of course, it did not;

but upon the theory that the Sunlit Fruit Company could recover from Elmer B. Jackson only the difference between the actual market price and the price to which the Company might voluntarily have advanced his contract price to him, *if he had delivered the fruit.* Mr. Hewitt stated that he could not show that the plaintiff offered to pay an advanced price to Jackson, "but it would only be an assumption that they would treat him the same as the others". (Trans. p. 105.)

Was this not entirely speculative and immaterial?

Mr. Hewitt argued:

> "If they voluntarily advance that price from $25 a ton to all the growers with whom they had contracts, then (as to) the difference between what they did pay and the $25 a ton would be the only damage that they would be able to collect on."

And, again, in renewing his offer, Mr. Hewitt stated:

> "Mr. HEWITT. Now, if you Honor please, I never like to keep going over the same ground, but yesterday the Court ruled that the question of showing that the canners in that section voluntarily advanced the price of peaches from $25.00 up, owing to war conditions, etc., was inadmissible. I have three witnesses here that I brought here particularly for the purpose of showing that all of the canneries purchasing fruit in that vicinity, voluntarily, through the influence of the Food Administration, advanced the price—I mean as to those that had ten-year contracts—from $25 to $35 up to as high as $85, including this plaintiff in this action, but

I do not care to prove or try to prove that, if the Court is still of the opinion that testimony of that nature is inadmissible.

"The COURT. I do not understand that it would be admissible unless you were able to show that the plaintiff voluntarily advanced the price to Jackson beyond that which it agreed to pay to Jackson under the contract, and *the fact that they may have voluntarily advanced the price to somebody else would not affect the contract price of the parties to this litigation, and for that reason I thought the evidence was incompetent.*

"Mr. HEWITT. Well, of course, under the situation here, I could not show that they offered to pay an advanced price to Jackson, but *it would only be an assumption that they would treat him the same as the others.* If that is still the ruling of the Court, we rest.

"The COURT. Yes, that is the ruling of the Court."

The ruling of the Court was clearly correct. The damages were the difference between the contract price and the market price. It was obviously immaterial to show that the plaintiff had *voluntarily* advanced the price to other growers, with whom it had contracts, beyond $25.00 a ton. The very terms of the offer showed that the evidence was not addressed to proving the market price, or what the plaintiff would have been, or was, required to pay to get the fruit in the open market, but it was offered to show that the plaintiff voluntarily, as a gratuity, had paid other growers more than $25.00 a ton, where they had contracted to sell for that price. As such, it was clearly immaterial, and the

ruling of the Court was right. This is made certain from the ruling of the Court as shown in the transcript, pp. 104-105.

What plaintiff and other canners actually and voluntarily paid to other growers who had entered into term contracts manifestly did not afford evidence of an open market price and, indeed, as shown, was not even offered as bearing upon that inquiry.

No authorities are cited by plaintiff in error in support of the argument as to Assignments of Error No. VI and No. VII, in regard to this ruling on evidence; obviously because none can be found. The rule is (*35 Cyc.,* 630 Sales):

> "Evidence is not admissible which is irrelevant, or does not conform to the proper measure or damages."

V.

ASSIGNMENTS OF ERRORS No. VIII AND No. IX.

These relate to the claimed invalidity of the contract because of no written authority to Laney, and also because of Section 172 of the Civil Code of the State of California; and what has gone before, clearly answers the argument on these points. Furthermore, the Assignments of Error VIII and IX, as given in the transcript, are *not* printed in the brief, and so must be regarded as abandoned.

VI.

OTHER ERRORS CLAIMED BUT NOT ASSIGNED.

It is certainly immaterial, if it be true, as claimed, that the clause in the contracts, attempting to provide that the covenants of the contracts shall run with the land, is invalid.

This suit was brought against the party to the contract as a personal action for damages. It is obvious that the invalidity of the attempt to make the contract go with the land has no effect upon the personal liability of the parties thereto; and this is the holding of the Courts of California in a recent case.

Pratt-Low Preserving Co. v. Evans, 36 Cal. App. Dec. 1036 (Jan. 1922);
15 Corpus Juris, p. 1301.

VII.

JUDGMENT IS CLEARLY NOT AGAINST LAW.

There is no basis whatever for the concluding paragraphs of the brief of the plaintiff in error, under the title, "Judgment Is Against Law". The expression, "Judgment against law", has a well-understood and definite meaning in the law of California. It covers the case of a failure to find on a material issue (*Adams v. Helbing,* 107 Cal. 298), and practically no other error.

Certainly, where the conclusion of law is properly drawn from the facts found, the judgment is not against law.

"Where conclusion of law is logically drawn from facts found, judgment is not against law."

Heath v. Scott, 65 Cal. 548.

In the present case, the Court found (Finding No. XVI), that plaintiff was damaged by the breach of one contract in the sum of $8059.33; and, (Finding XXXIII), that plaintiff was damaged by the breach of the other contract in the sum of $36,647.85. The conclusion of law that plaintiff was damaged in the total sum of $44,707.18 is simply an addition of the two amounts of damages found in the findings of fact; and thus, obviously, the conclusion of law is supported by the findings of fact.

(a) No errors assigned as to damages.

Plaintiff in error is not in a position to question the amount of damages; for this is a question of fact, and a review is obviously impossible in the entire absence of any exceptions noted, and of any evidence brought up bearing upon that question. The Court found the amount of damages; the conclusion of law follows the findings of fact; therefore, any consideration of the amount of damages is here impossible. There was no request for any finding, and there was no motion to the trial Court, nor any attempt made in any way to question the sufficiency of the evidence to support the findings.

Dangberg Land & Livestock Co. v. Day, 247 Fed. 477.

It is well settled that, in cases in this Court on writ of error, questions of fact cannot be reviewed, except errors of law presented by exceptions to the refusal of a request to make a finding one way or the other, and a finding which is not supported by any evidence whatever, made by the lower Court over the remonstrance of the plaintiff in error. In these two cases, errors presented by a bill of exceptions and properly assigned, may be considered. As to these questions of law, obviously plaintiff in error is not seeking to present such errors, for no bill of exceptions or assignment of errors whatever is presented.

Pacific Sheet Metal Works v. California Canneries Co., 164 Fed. 980 (at p. 982):

> "The plaintiff in error insists that the Circuit Court erred in finding that there was a failure on its part to deliver 143,000, or any number of cans, required or needed by the defendant in error at its cannery. Whether there was such failure or not is a pure question of fact, and this being an action at law, and before us on writ of error, the finding of the Circuit Court as to the fact, if there was any evidence upon which to base the finding, is conclusive here. *King v. Smith,* 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708; *Eureka County Bank v. Clarke,* 130 Fed. 326, 64 C. C. A. 571; *Dooley v. Pease,* 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *Stanley v. Supervisors,* 121 U. S. 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Runkle v. Burnham,* 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694; *Hathaway v. Bank,* 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004."

The Frances Wright, 105 U. S. 387.

The proceedings in the trial Court were correct in every particular.

It is not at all unusual for the Court to award damages for breach of contract, although the time for full performance had not arrived when the plaintiff's action was brought, and there is nothing in Section 3301 of the Civil Code contrary thereto.

Jackson refused to deliver the 1918 fruit, and announced that he would never deliver any fruit at all. He thus committed a total breach of contract, for which the plaintiff elected to bring a suit for damages and had but one remedy, an action for damages, in which plaintiff necessarily recovered the entire damage.

Roehm v. Horst, 178 U. S. 1;
Lompoc Produce etc. Co. v. Browne, 28 Cal. App. Dec. 1416; 183 Pac. 166;
Central Trust Co. of Ill. v. Chicago etc. Ass'n, 240 U. S. 581;
California Civil Code, Sec. 1440;
Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242.

Hale v. Troutt, 35 Cal. 229:

Holding, that for breach of entire contract, plaintiff may recover entire damages in one suit, without waiting for time of full performance. Accord:

Remy v. Olds, 88 Cal. 537;
Bagley v. Cohen, 121 Cal. 604.

Authorities were cited by plaintiff in the lower Court, amply supporting the view of the trial Court

that, where defendant has totally broken a contract, although the time for full performance has not arrived, plaintiff may bring an action for the entire damage, without waiting the time for full performance. In such action the market value at the time of anticipatory breach is a proper measure of damages.

McBath v. Jones, 149 Fed. 383;
Williams v. De Soto Oil Co., 213 Fed. 194;
Armstrong v. Walters, 223 Fed. 451;
Armstrong v. Walters, 219 Fed. 322;
Hawke v. Pine Lumber Co., 62 S. E. 752;
Masterton v. Mayor, 7 Hill. 61.

Allen v. Field, 130 Fed, 641:

An action brought for damages on a contract, whereby the defendants had agreed to purchase a certain amount of whisky, the product of plaintiff's distillery, for fifteen seasons, at a stipulated price per gallon. After the contract had been performed for a short time, defendants refused to take more whisky, and plaintiffs brought suit at a time when about thirteen years of the fifteen-year period were left. It was held that plaintiff was entitled in that suit to recover the entire damages for the full fifteen-year period.

"The general rule is that an unqualified refusal without legal excuse, to further perform a continuing executory contract, authorizes the injured party to sue at once for any damage he has suffered from the breach."

Roehm v. Horst, 178 U. S. 1;
Marks v. Van Eeghen, 88 Fed. 853;
Masterton v. The Mayor, 7 Hill. 61;

Devlin v. The Mayor, 63 N. Y. 25;
In re Stern, 166 Fed. 604;
Hochster v. De Latone, 2 El. & Bl. 678.

The case of *Allen v. Field* was reversed on the first appeal, for errors of law, and was tried the second time, and appealed the second time, all within the first seven years of the fifteen years; yet it was held consistently, and, in fact, was practically conceded by the defendants, that the plaintiff was entitled to recover the damages for the entire fifteen years, although at the time the suit was brought only three years had expired.

Allen v. Field, 144 Fed. 840;
Semet-Solway Co. v. Wilcox, 143 Fed. 842;
Quigley v. Spencer Stone Co., 143 Fed. 90.

Lompoc Produce & Real Estate Co. v. Browne, 28 Cal. App. Dec. 1412, 183 Pac. 166:

> Action by buyer against seller for breach of contract to sell bean crop on refusal of seller to perform before delivery was due. *Held:*
>
> "The market value of the beans at the time of the breach was a proper measure of damages. *Masterton v. Mayor of Brooklyn,* 7 Hill. (N. Y.) 61, 42 Am. Dec. 38, quoted with approval in *Hale v. Troutt,* 35 Cal. 229, at page 243; *Roehm v. Horst,* 178 U. S. 1, at page 21, 20 Sup. Ct. 780, 44 L. Ed. 953."

(b) Authorities cited by plaintiff in error are not in point.

The cases cited by plaintiff in error, at page 34, are not in point.

Cornell v. Western Union etc., 199 Pac. 1087, was an action for damages against the Telegraph Company for failure to deliver a telegram promptly.

Westwater v. Rector etc., 140 Cal. 339, was an action by a choir singer against a church for damages for injury to the reputation of the plaintiff, through a dismissal without notice, there being no allegations in the complaint as to wages, or anything to show a right to recover as for breach of contract.

Lane v. Stooke, 101 Pac. 937, was an action against an attorney at law for breach of contract, on the ground that the proceedings in which the attorney had been engaged terminated adversely to the plaintiff because the attorney refused to act any further in the matter.

When a plaintiff in error can bring to bear on an action of this nature, for damages for the breach of a contract to sell personal property, only authorities involving such widely variant situations, is it not obvious that no authorities in point can be produced?

The statements at the close of the brief of the plaintiff in error, based upon what is said to be a matter of common knowledge, as to the market price of peaches in California last year being only $30.00 and $35.00 a ton, are as incorrect in fact as they are improper in a brief of this kind. There is no assignment of error as to the amount of damage, or the rule applied; and the action of the Court below was perfectly proper, and eminently fair to the defendant. The market price last year in California, as a matter of fact, was about $60.00 a ton; and if it should be lower in the future, that is a matter which

defendant had ample opportunity to present and presumably did present to the Court below for its consideration. It cannot be considered here.

Wherefore, it is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,
February, 18, 1922.

BURKE CORBET,
JOHN R. SELBY,
Attorneys for Defendant in Error.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

[Title of Court and Cause.]

MEMORANDUM OPINION.

Memorandum by BEAN, District Judge:

On February 16, 1917, E. B. Jackson and the plaintiff, acting through its agent, T. E. Laney, entered into two written contracts by the terms of which Jackson agreed to sell and plaintiff to buy the peaches to be grown on certain described premises during the period from 1917 to 1926, inclusive, at a certain stipulated price per ton, Jackson was to deliver the fruit in good condition for canning, the plaintiff to accept and pay for same upon demand at any time after three days from receipt at factory.

Jackson delivered the peaches grown during the year 1917 as provided in the contract, and they were received and paid for by plaintiff.

In July, 1918, however, the market price for peaches had materially advanced and Jackson thereupon repudiated his contracts, and advised the plaintiff that he would make no further delivery in accordance therewith, but sold and delivered his peaches to another party.

In September, 1918, plaintiff brought this action against him to recover damages not only for the failure to deliver the 1918 crop, but the entire damages suffered by reason of his breach. Jackson appeared in the action but subsequently died, and the

plaintiff presented its claim to his executor as required by the laws of California and it was disallowed. It thereupon filed a supplemental complaint making the executrix defendant, and tendering issue as to the quantity of peaches that would be grown on the described premises during the years 1919 to 1926, inclusive. Issue was joined and the case tried before the Court without the intervention of a jury. Elaborate briefs have been submitted.

Although the questions of the quantity of peaches grown and which will be grown on the described premises during the life of the contract, the market price of the peaches at the time of the breach, and the measure and amount of damages are all carefully and elaborately considered and discussed in plaintiff's opening brief, counsel for defendant does not controvert any of them, but says it is unnecessary to do so "as we rely on the defenses herein set forth", which are stated by him as follows:

(1) That the contracts set out in the complaint are invalid by reason of the fact that the authority of Laney as agent of the company to execute same on behalf of the company was not in writing.

(2) That the contracts were void by reason of the fact that the wife of the seller of the fruit did not join in executing the agreement of sale.

(3) The plaintiff did not pay for all the fruit delivered to it by Jackson during the first year, and for that reason was not in position to enforce the contract for subsequent years.

(4) That under the law of California, Jackson could not make a contract of the kind set forth in the complaint that would be binding upon his heirs.

(5) That the Court has no jurisdiction of the action, it being one prosecuted against the executrix of the will of a deceased person, the administration of whose estate is pending in the county of which he died a resident.

I shall dispose of the case upon the assumption that if the alleged "defenses" are not well taken, the plaintiff is entitled to recover in accordance with the position of its counsel. If it is error to do so it is invited error, for the Court is justified in taking defendant's counsel at his word and assuming that he concedes the soundness of the position of his opponent if his own is not well taken. I shall therefore briefly consider the alleged defenses in their order.

(1) The contracts in suit are concededly within the statute of frauds. They were signed, however, by Jackson, "the party to be charged," and recognized and acted upon as valid and binding by both parties until July, 1918. It is, therefore, no defense to this action that the agent of the plaintiff was without written authority to execute it for and on behalf of his principal. (Strauss vs. Eaton, 190 Pac. 1033; Fidelity Co. vs. Fresno, Flume, 161 Cal. 473, 119 Pac. 646; Copple vs. Aigeltinger, 167 Cal. 706, 140 Pac. 1073; In re Neff, 157 Fed. 57; Beckwith vs. Clark, 188 Fed. 171.)

(2) The contracts in suit are not contracts of present sale, but are executory contracts for future sale and delivery of personal property. The language of each is, "the seller has agreed to sell to the buyer and the buyer has agreed to buy from the seller for a period of ten years from 1917 to 1926, inclusive". It is immaterial, therefore, whether Jackson owned the land upon which the peaches were to be grown in his own right or it was community property. His contracts were to sell to plaintiff in future certain property and, as said in Irwin vs. Williar (110 U. S. 508), "The generally accepted doctrine in this country is as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them." (See, also, Ruling Case Law, p. 1249, sec. 67; Bibb vs. Allen, 149 U. S. 492; Clews vs. Jamieson, 182 U. S. 461; Smith vs. Seman, 32 Cal. App. 644

(3) At one time Jackson claimed that a small amount due for the peaches delivered in 1917 had not been paid by the defendant. This was probably due to some confusion between the "weigh checks" and the "teamsters' tags". I am satisfied from the evidence that the entire purchase price was, in fact, paid as claimed by plaintiff. But, however that may be, the failure to pay the small amount in dispute, if it were in fact due Jackson, would not of itself absolve him from proceeding with the contract.

There was nothing in the circumstances to indicate that the plaintiff thereby intended to repudiate the contract or to be no longer bound thereby. (Monarch Cycle vs. Royer Wheel, 105 Fed. 324; Mich. Y. & P. vs. Busch, 143 Fed. 929; Catlin Cons. Co. vs. Guerini, 241 Fed. 5521; Walker vs. Warring, 65 Or. 149; Cherry V. I. vs. Florence I. Wks., 64 Fed. 569.)

4 and 5. These two defenses may be considered together. This is not a suit against the heirs or personal representatives of a deceased person to enforce the specific performance of a contract for the sale of personal property, nor does it come within the provisions of section 1597, Code of Civil Procedure of California, authorizing the probate court to direct the executor or administrator of a deceased person to make transfer of personal property contracted to be conveyed by the deceased. It is a simple action at law to recover damages for a breach of contract against the party to be charged, commenced during his lifetime. The cause of action was complete in plaintiff at the time of the breach. It could then sue to recover the entire damages suffered by it. The action was, in fact, commenced before Jackson's death.

The Court had jurisdiction by reason of diversity of citizenship. His death did not deprive the Court of jurisdiction, whatever may have been the effect if he had not himself breached the contract. When, upon Jackson's breach of the contract plaintiff elected to treat it as at an end and sue for damages,

the contract as a subsisting contract of sale ceased to exist except for the purpose of measuring plaintiff's damages. Jackson himself could not thereafter have offered to perform and compelled acceptance of his proposition and a dismissal of the action. His estate is in no better position. (Cent. Trust vs. Chicago Aud., 240 U. S. 581; Roehm vs. Horst, 178 U. S. 1; Anvil M. vs. Humble, 153 U. S. 540; Lake Sh. & M. S. R. vs. Richards, 157 Ill. 59.)

The fact in compliance with the laws of California, plaintiff, after Jackson's death, presented its claim to his executrix for allowance or rejection, and subsequently filed a supplemental complaint making her a defendant does not oust this Court of jurisdiction, nor require action to establish its claim to be brought in the State Court. As said by the Supreme Court of the United States in Security Trust Co. vs. Black River National Bank (187 U. S. 211): "Some general principles have become so well settled as to require only to be stated; one of these is that a foreign creditor may establish his debt in the courts of the United States against the personal representative of the decedent, notwithstanding the fact that the laws of the State relative to administration and settlement of decedent estates do in terms limit the rights to establish such demands to a probate court of the state."

Judgment will, therefore, be entered in accordance with the findings of fact and conclusions of law filed herewith.

(Endorsed): Filed January 18, 1921.

Walter B. Maling, Clerk.